

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

APRIL TERM, 1939.

No. 7460

506

JOHN D. GLASS, APPELLANT,

vs.

HAROLD L. ICKES, SECRETARY OF THE
DEPARTMENT OF THE INTERIOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED JULY 6, 1939

PRINTED AUGUST 21, 1939

JUDGE D. LAWRENCE GRONER
UNITED STATES COURT OF APPEALS
WASHINGTON, D. C.

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HAROLD L. ICKES, SECRETARY OF THE
DEPARTMENT OF THE INTERIOR,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

a District Court of the United States for the
District of Columbia.

Civil Action No. 925

JOHN D. GLASS, *Plaintiff*,

vs.

HAROLD L. ICKES, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the
United States for the District of Columbia, at
the City of Washington, in said District, at the
times hereinafter mentioned, the following papers
were filed and proceedings had, in the above-en-
titled cause, to wit:

1 *First Amended Complaint.*

Filed January 16 1939

In the District Court of the United States for the
District of Columbia.

Civil Action No. 925

JOHN D. GLASS, Peoples Bank Building, Tyler, Texas,
Plaintiff,

vs.

HAROLD L. ICKES, Department of the Interior,
Washington, D. C., *Defendant*.

John D. Glass, the plaintiff in the above entitled action
files his First Amended Original Complaint in lieu of his
Complaint filed herein on the 7th day of December A. D.
1938.

The plaintiff for his cause of action and by way of an
amended complaint, complains of the defendant and al-
leges:

I.

That the plaintiff is an attorney at law duly licensed to practice his profession in the State of Texas and that he lives and resides at Tyler, Smith County, Texas.

II.

That the defendant, Harold L. Ickes is a citizen of the United States and now resides in the District of Columbia, and is the duly appointed, acting and qualified Secretary of the Department of the Interior.

III.

That on the 23rd day of November, 1938, in the City of Washington, District of Columbia, the defendant wilfully and maliciously published, released, circulated and delivered to the Press Associations and to the Kilgore Daily

2 News, a daily newspaper of Kilgore, Texas, and to Paul E. Hadlick, Secretary of the National Oil Marketers Association, Washington, D. C. and to J. Edward Jones of New York City, New York, and to divers other persons, and caused to be published to the world, a false and defamatory written memorandum press release of the defendant dated November 23, 1938, in which press release the defendant advised and warned all oil operators to investigate plaintiff, and falsely and maliciously made false and defamatory statements to the effect that the plaintiff had been prevented and barred from practicing before the Federal Tender Board because he had sold or attempted to sell confidential knowledge which he had previously obtained when employed by the Government and because he had attempted to represent in a proceeding before said Board one Everett Brewer whom he had investigated while employed by the Government, in a matter in which plaintiff had previously acted or passed upon while employed by the Government; conveying, and intended to convey to all oil operators and the public false statements to the effect that plaintiff immorally, unethically, and unlawfully sold or attempted to sell or otherwise misuse confidential information and knowledge, obtained while previously employed by the Government, in a certain case or proceeding before said Board, and that plaintiff was unworthy of the confidence and respect of all oil operators and the public.

IV.

That the exact wording of the said press release of the defendant is as follows, to wit:

United States
Department of the Interior
Memorandum for the Press

For Release November 23, 1938.

Oil operators being "personally" invited on a "strictly confidential" basis to contribute some \$5,000 to an oil lobbying fund sought by John D. Glass, Tyler, Texas lawyer, were advised by Secretary of the Interior Harold L. Ickes to day to investigate.

3 Making information which had come to him public, Secretary Ickes said:

"Mr. Glass has been barred from practice before the Department. The Courts to date have refused Mr. Glass' prayer that this action be enjoined. I suggest that oil operators given an opportunity by Mr. Glass to kick in to his fund stop, look, and listen before they finance this proposed one-man lobby."

The present letters are being circulated under Mr. Glass' professional letterhead and over his signature reciting that he is engaged in an effort to secure "immediate reforms in the Connally Hot Oil Act enforcement" to eliminate what he describes as "discriminations". These letters which go to oil operators set forth that he desires legislation to benefit various persons engaged in the oil business including "small independent units". He also advocates legislation to end prosecuting violators under felony statutes and substitutes misdemeanor prosecutions. Mr. Glass states that he proposes to enlist senators and representatives in support of his proposals, and recites that he has gotten certain publications to support his stand and concludes:

"I have much personal interest in this matter and had intended to pursue it without any material financial assistance. But my present income is so limited that it now appears that to properly carry forward this campaign will

require help to the extent of about \$5,000. I am therefore writing this to you and to several other oil operators who I believe should be interested. I ask that you please give it your careful consideration, and if you believe my efforts are worth while, that you kindly communicate to me any suggestions you may have to offer as to how I might acquire the needed funds."

"The source of any assistance offered will be kept strictly confidential as will any communication from you in the matter."

The record shows that prior to September 15, 1937 Mr. Glass was chief investigator of the Federal Petroleum Agency No. 1 in the Department of the Interior, the investigative agency of Federal Tender Board No. 1. Effective September 15, 1937 he resigned his position in order to practice law at Tyler, Texas. A Departmental regulation promulgated by Secretary Ickes in March of 1933 provides that no ex-employee of the Department may practice before the Department or any of its agencies or boards for two years after his services with the Department are terminated. This regulation is to prevent Government employees selling confidential knowledge and experience. Contrary to such regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board. Prior to his resignation Mr. Glass had supervised a matter in which Mr. Brewer was concerned and has initialed and signed memoranda to his superior, the Director of the Federal Petroleum Agency in which he had recommended that certain action be taken. After Mr. Glass resigned Mr. Brewer was subpoenaed by the Federal Tender Board to appear before the Board and testify in this very matter.

4 When these facts were called to the attention of the Secretary of the Interior, he pointed out to the Federal Tender Board the existence of the Departmental regulation and instructed the Federal Tender Board that it be governed thereby in the event any former employee should appear before the Board. Mr. Glass was thereafter prevented from practicing before the Board.

He commenced an action in the United States District Court in Texas against the Federal Tender Board attempt-

ing to enjoin the Board from preventing him from practicing before it. That action was dismissed for failure to serve Secretary Ickes as a defendant. Thereupon Glass brought an action in the United States District Court for the District of Columbia against Secretary Ickes and the Director of the Petroleum Conservation Division to enjoin them from enforcing the Departmental regulation and preventing him from practicing before the Federal Tender Board.

Among the grounds urged by Glass for the issuance of an injunction were the lack of authority of the Secretary to promulgate the regulation, its unreasonableness, its unconstitutionality, and that it was being unfairly applied to him. He moved the Court for a preliminary injunction but the motion was denied by Judge Bailey who held that the Secretary was authorized to promulgate the regulation, and that it was reasonable.

V.

That the matter contained in said memorandum release of said defendant Ickes, insofar, as they relate to any barring of plaintiff from practicing before said Federal Tender Board, are false and defamatory. Plaintiff did not do anything contrary to, or in violation of, any regulation promulgated to prevent Government employees from selling confidential knowledge; and plaintiff did not represent said Everett Brewer or attempt to represent him, in any matter or proceeding before said Federal Tender Board upon which he had acted or passed upon when previously employed by the Government; and the plaintiff did not sell or attempt to sell any confidential knowledge obtained by him while employed by the Government.

VI.

The Federal Tender Board did on October 29, 1937 pursuant to instructions of the Secretary of the Interior, rule that henceforth no former employees of the Department of Interior would be permitted to appear as an agent or attorney before said Board for a period of two years after leaving the service and on that date the board advised the plaintiff that under that ruling it would not permit him to appear before it in such capacities.

But there was nothing in connection with that ruling which reflected upon the character or reputation of this plaintiff and plaintiff committed no acts prior or subsequent thereto that would justify any warning to the public or oil operators that he should be investigated and that he was unworthy of their respect because he was not permitted to practice before said Board or that he was barred from practicing before said Board because of any attempt to sell confidential knowledge or any other immoral or unethical conduct.

VII.

That by reason of the publication, release and circulation by the said defendant of the sale false and defamatory press release, as aforesaid, said press release was published and circulated by the Kilgore Daily News, a newspaper of Kilgore, Texas, and copies of said press release were delivered to and circulated among divers oil operators and employees of oil companies and other persons in the State of Texas, and elsewhere in the United States of America.

VIII.

That the said defendant well knew at the time he published, released and circulated said memorandum press release that the false and defamatory statements contained therein, as aforesaid, were false, and the said defendant deliberately, wilfully, and maliciously published, released and circulated said press release for the purpose of injuring, damaging and discrediting plaintiff and his reputation, and for the purpose of injuring and destroying his professional standing and reputation as an attorney and member of the bar of the State of Texas.

IX.

That by reason of the matters and things hereinbefore alleged the plaintiff has been damaged in the sum of Two Hundred and fifty thousand dollars, and by reason of the willful and malicious acts of the said defendant, the plaintiff is entitled to exemplary damages in the sum of Five Hundred thousand dollars.

WHEREFORE, Plaintiff prays for judgment against the defendant for his actual and exemplary damages in the sum

of Seven hundred and fifty thousand dollars (\$750,000.00) and for costs of this action, and for general relief.

C L DAWSON

Attorney for the Plaintiff.

Personal service of the within amended complaint is hereby admitted this 16th day of January A. D. 1939.

HARRY M EDELSTEIN

Attorney for the Defendant.

Motion to Dismiss

Filed March 10 1939

*

*

*

The defendant moves the court to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

Dated March 10, 1939.

NATHAN R. MARGOLD,

Solicitor, Department of the Interior.

FREDERIC L. KIRGIS

First Assistant Solicitor, Department of the Interior.

HARRY M EDELSTEIN

*Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.*

7

Final Judgment

Filed May 18 1939

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*

The above-entitled cause having come on to be heard on the defendant's motion to dismiss the action because the amended complaint fails to state a claim against defendant upon which relief can be granted; and the parties hereto having appeared in open court by their respective attorneys on April 18, 1939, and the arguments of said attorneys having been heard; and the matter having been carefully considered, the court being fully advised in the premises, it is hereby

Adjudged this 18th day of May, 1939, that defendant's said motion to dismiss the action be and the same hereby is granted, and it is further

Adjudged that the action be and the same hereby is dismissed.

Wherefore, it is considered that the plaintiff takes nothing by this suit, and the defendant goes hence without day, is for nothing held and recovers of the plaintiff his costs of defense to be taxed by the clerk and has execution thereof.

JOSEPH W COX

Justice.

Approved as to form:

C. L. DAWSON

Attorney for Plaintiff.

8

Notice of Appeal

Filed May 29, 1939

*

*

*

Notice is hereby given this 29th day of May A. D. 1939, that John D. Glass, plaintiff in the above entitled cause hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of May A. D. 1939, in favor of Harold L. Ickes, said defendant, and against John D. Glass, said plaintiff.

C L DAWSON

Attorney for the Plaintiff.

Memorandum

May 29 1939

Cost bond on appeal \$250—filed.

Assignment of Errors

Filed May 29 1939

*

*

*

Comes now the plaintiff, John D. Glass, by his attorney and assigns for error that the Court Erred in each of the following particulars:

1. That the Court erred in sustaining the motion of the defendant to dismiss this action for the reason that said amended complaint did not state facts sufficient to constitute a cause of action.

2. That the Court erred in entering judgment for the defendant, and against the plaintiff.

9 3. And for other errors apparent of record.

C L DAWSON

Attorney for the Plaintiff.

Designation of Record

Filed June 2 - 1939

*

*

*

The clerk will please prepare a transcript of the record in the above entitled cause, on appeal to the U. S. Court of Appeals of the District of Columbia, and include therein the following:

1. First amended complaint.
2. Motion to dismiss.
3. Judgment.
4. Notice of Appeal.
5. Bond on Appeal.
6. Assignment of errors.
7. This designation of record.

C L DAWSON

Attorney for the Plaintiff.

Service of the within and foregoing designation of record is hereby acknowledged this 1st day of June A. D. 1939.

NATHAN R. MARGOLD,

Solicitor Department of the Interior.

By HARRY M EDELSTEIN

Assistant Solicitor.

10 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 9, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 925, Civil Action, wherein John D. Glass is Plaintiff and Harold L. Ickes is Defendant, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of June, 1939.

(Seal) C. E. STEWART,
Clerk.

Endorsed on Cover: No. 7460. John D. Glass, Appellant, vs. Harold L. Ickes, Secretary of the Department of the Interior. United States Court of Appeals for the District of Columbia. Filed Jul 6-1939 Joseph W. Stewart, Clerk.

No. 7460. FILED SEP 26 1939

Joseph W. Stewart

CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1939.

JOHN D. GLASS, APPELLANT,

v.

HAROLD L. ICKES, Secretary of the Interior,
APPELLEE.

*Appeal from the District Court of the United States for
the District of Columbia.*

BRIEF FOR APPELLANT.

JOHN D. GLASS,
Appellant.
CLAUDE L. DAWSON,
Attorney for Appellant.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

April Term, 1939.

No. 7460.

JOHN D. GLASS, *Appellant*,
v
HAROLD L. ICKES, Secretary of the Interior, *Appellee*.

*Appeal from the District Court of the United States for
the District of Columbia.*

BRIEF FOR THE APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal by John D. Glass from a final judgment of the District Court of the United States for the District of Columbia entered on May 18, 1939, sustaining a motion to dismiss (R. 7) the Complaint (R. 1) in a suit of said Glass against Harold L. Ickes seeking actual and exemplary damages in the total sum of \$750,000 because of an alleged libelous publication released by said Ickes at Washington, D. C., on the 23d day of November, 1938, defaming the character of said Glass.

The Complaint alleged that the appellant Glass resides at Tyler, Smith County, Texas; and that appellee Ickes is the Secretary of the Interior and resides in the District of Columbia (R. 2). The appeal was perfected by duly filed Notice of Appeal, Cost Bond, Assignment of Errors, and Designation of Record (R. 8, 9).

STATEMENT OF THE CASE.

Inasmuch as the question arises upon a judgment sustaining a motion to dismiss the Complaint the alleged cause of action and grounds for relief sought, so far as they are material to this appeal, are as alleged in the Complaint (R. 1 to 7), the material allegations of which, excepting those of jurisdictional facts and damages, are to the following effect (R. 2 to 6):

That on the 23d day of November, 1938, in the District of Columbia, the appellee Harold L. Ickes, wilfully and maliciously published, released, circulated and delivered to the Press Associations and to the Kilgore Daily News, a daily newspaper of Kilgore, Texas, and to Paul E. Hadlick, Secretary of the National Oil Marketers Association, Washington, D. C., and to J. Edward Jones of New York City, and to divers other persons, and caused to be published to the world, a false and defamatory written press release of the appellee in which the appellee advised all oil operators to investigate appellant Glass, and maliciously made false and defamatory statements to the effect that the appellant, a lawyer, had been barred from practicing before the Department of the Interior because he had sold or attempted to sell confidential knowledge which he had previously obtained when employed by the Department and had attempted to represent one Everett Brewer before the Federal Tender Board, in a

matter in which he had previously acted or passed upon while employed by the Department; conveying, and intended to convey to all oil operators and the public false statements to the effect that plaintiff immorally, unethically, and unlawfully sold or attempted to sell or otherwise misuse confidential information and knowledge obtained while previously employed by the Government; and the appellee Ickes knew at the time he published said press release that the defamatory statements therein were false, and he deliberately published them for the purpose of injuring the appellee Glass and destroying his reputation and professional standing as an attorney at law.

The press release of appellee was copied into the Complaint (R. 3), as follows:

"UNITED STATES
"DEPARTMENT OF THE INTERIOR.
"MEMORANDUM FOR THE PRESS.

"For Release November 23, 1938.

"Oil operators being 'personally' invited on a 'strictly confidential' basis to contribute some \$5,000 to an oil lobbying fund sought by John D. Glass, Tyler, Texas, lawyer, were advised by Secretary of the Interior Harold L. Ickes to-day to investigate.

"Making information which had come to him public, Secretary Ickes said:

" 'Mr. Glass has been barred from practice before the department. The Courts to date have refused Mr. Glass' prayer that this action be enjoined. I suggest that oil operators given an opportunity by Mr. Glass to kick in to his fund stop, look, and listen before they finance this proposed one-man lobby.'

"The present letters are being circulated under Mr. Glass' professional letterhead and over his signature reciting that he is engaged in an effort to

secure 'immediate reforms in the Connally Hot Oil Act enforcement' to eliminate what he described as 'discriminations.' These letters which go to oil operators set forth that he desires legislation to benefit various persons engaged in the oil business including 'small independent units.' He also advocates legislation to end prosecuting violators under felony statutes and substitutes misdemeanor prosecutions. Mr. Glass states that he proposes to enlist senators and representatives in support of his proposals, and recites that he has gotten certain publications to support his stand and concludes:

" 'I have much personal interest in this matter and had intended to pursue it without any material financial assistance. But my present income is so limited that it now appears that to properly carry forward this campaign will require help to the extent of about \$5,000. I am therefore writing this to you and to several other oil operators who I believe should be interested. I ask that you please give it your careful consideration, and if you believe my efforts are worth while, that you kindly communicate to me any suggestions you may have to offer as to how I might acquire the needed funds.

" 'The source of any assistance offered will be kept strictly confidential as will any communication from you in the matter.'

"The record shows that prior to September 15, 1937, Mr. Glass was chief investigator of the Federal Petroleum Agency No. 1 in the Department of the Interior, the investigative agency of Federal Tender Board No. 1. Effective September 15, 1937, he resigned his position in order to practice law at Tyler, Texas. A Departmental regulation promulgated by Secretary Ickes in March of 1933, provides that no ex-employee of the Department may practice before the Department or any of its agencies or boards for two years after his services with the Department are terminated. This regulation is to prevent Government employees selling confidential knowledge and experi-

ence. Contrary to such regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board. Prior to his resignation Mr. Glass had supervised a matter in which Mr. Brewer was concerned and has initialed and signed memoranda to his superior, the Director of the Federal Petroleum Agency in which he had recommended that certain action be taken. After Mr. Glass resigned Mr. Brewer was subpoenaed by the Federal Tender Board to appear before the Board and testify in this very matter.

"When these facts were called to the attention of the Secretary of the Interior, he pointed out to the Federal Tender Board the existence of the Departmental regulation and instructed the Federal Tender Board that it be governed thereby in the event any former employee should appear before the Board. Mr. Glass was thereafter prevented from practicing before the Board.

"He commenced an action in the United States District Court in Texas against the Federal Tender Board attempting to enjoin the Board from preventing him from practicing before it. That action was dismissed for failure to serve Secretary Ickes as a defendant. Thereupon Glass brought an action in the United States District Court for the District of Columbia against Secretary Ickes and the Director of the Petroleum Conservation Division to enjoin them from enforcing the Departmental regulation and preventing him from practicing before the Federal Tender Board.

"Among the grounds urged by Glass for the issuance of an injunction were the lack of authority of the Secretary to promulgate the regulation, its unreasonableness, its unconstitutionality, and that it was being unfairly applied to him. He moved the Court for a preliminary injunction but the motion was denied by Judge Bailey who held that the Secretary was authorized to promulgate the regulation, and that it was reasonable."

Counsel for appellee, in support of the Motion to Dismiss, argued that the Complaint is insufficient, on two grounds, namely: That the allegedly libelous statements "are obviously not defamatory"; and that their issuance "was an incident to" the performance of the defendant's duties as Secretary of the Interior and hence was absolutely privileged.

The Honorable Justice Joseph W. Cox in sustaining the motion to dismiss rendered no opinion.

STATEMENT OF POINTS.

The Court erred in sustaining the motion to dismiss the action upon the grounds that the Complaint fails to state a claim against the defendant upon which relief can be granted.

SUMMARY OF ARGUMENT.

I.

The Press Release of the Appellee is Defamatory as Alleged in Appellant's Complaint.

Authorities: *Washington Post Co. v. Chaloner*, 250 U. S. 290, 39 S. Ct. 448, 63 L. Ed. 987; *Daily v. New York Herald Co.*, 151 Fed. 114; *Commercial Pub. Co. v. Smith*, 149 Fed. 704, 79 C. C. A. 410; *Hanchett v. Chiotovich*, 101 Fed. 742, 41 C. C. A. 648 (Aff. 96 Fed. 681); *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201; *Whitney v. Janesville Gazette*, 29 F. cas. No. 17,590, 5 Biss 330; *Grand Union Tea Co. v. Lord*, 231 Fed. 390, 145 C. C. A. 384; *Mann v. Dempster*, 181 Fed. 76, 104 C. C. A. 110; *Guisti v. Galveston Tribune* (Texas S. Ct.) 105 Tex. 497, 150 S. W. 874, 152 S. W. 167; *A. H. Belo & Co. v. Smith* (Texas S. Ct.), 42 S. W. 850; and *Culmer v. Canby*, 101 Fed. 195, 41 C. C. A. 302.

II.

The Defamatory Statements in Appellee's Press Release are Not Absolutely Privileged.

- (a). *The press release is not an official communication published in the course of official duty within the rule of absolute privilege.*

Authorities: *Spalding v. Vilas*, 161 U. S. 483; *Mellon v. Brewer*, 57 App. D. C. 126, 18 F. (2d) 168, Cert. den. 275 U. S. 530; *De Arnaud v. Ainsworth*, 24 App. D. C. 167; *Miles v. McGrath*, 4 Fed. Supp. 603 (D. C. Md.); *Harwood v. McMurtry*, 22 Fed. Supp. 572; *United States v. Brunswick*, 63 App. D. C. 65, 69 F. (2d) 383; *Farr v. Valentine*, 38 App. D. C. 413; *Smith v. O'Brien*, 66 App. D. C. 387, 88 F. (2d) 769; *Cooper v. O'Connor*, 99 F. (2d) 135; and *Standard Nut Co. v. Mellon*, 63 App. D. C. 339, 72 F. (2d) 557, Cert. den. 293 U. S. 605.

- (b). *The defamatory statements in appellee's press release are wholly unrelated and foreign to the subject-matter of the release and wholly unnecessary to accomplish any lawful purpose relative to the occasion for the release.*

Authorities: *De Arnaud v. Ainsworth*, 24 App. D. C. 167; *Miles v. McGrath*, 4 Fed. Supp. 603; and *Mellon v. Brewer*, 57 App. D. C. 126, 18 Fed. 168, Cert. den. 275 U. S. 530.

ARGUMENT.

I.

The Press Release of the Appellee is Defamatory as Alleged in Appellant's Complaint.

The law appears well settled that, in construing language to determine whether a particular statement or publication is actionable, its meaning will be ascertained from the words used as commonly understood. The rule is variously stated: The language should be given that meaning which would be placed upon it by the ordinary person who might read or hear of it. The words are to be taken in their plain and natural meaning, and to be construed in the courts as they would be understood by ordinary persons of reasonable understanding, and according to the sense in which they appear to have been used and the ideas they are adapted to convey.

Also, that words are to be interpreted in connection with the circumstances in which they were uttered; and that words which would ordinarily not be actionable may be spoken under such circumstances, and in connection with such other language, as to be highly defamatory.

Also, that it is not necessary, to render words defamatory and actionable, that they shall make a defamatory charge in direct terms. It may be made indirectly, by inference, by insinuations or by sarcasm or irony; and it matters not how artful or disguised the real meaning is concealed.

Among the many reported cases supporting the above propositions are:

- Washington Post Co. v. Chaloner*, 250 U. S. 290, 39 S. Ct. 448, 63 L. Ed. 987.
Dailey v. New York Herald Co., 151 Fed. 114.
Commercial Pub. Co. v. Smith, 149 Fed. 704, 79 C. C. A. 410.
Hanchett v. Chiotovich, 101 Fed. 742, 41 C. C. A. 648 (Aff. 96 Fed. 681).
Post Pub. Co. v. Hollam, 59 Fed. 530, 8 C. C. A. 201.
Whitney v. Janesville Gazette, 29 F. Cas. No. 17,590, 5 Biss 330.
Grand Union Tea Co. v. Lord, 231 Fed. 390, 145 C. C. A. 384.
Mann v. Dempster, 181 Fed. 76, 104 C. C. A. 110.
Guisti v. Galveston Tribune (Texas S. Ct.), 105 Tex. 497, 150 S. W. 874, 152 S. W. 167.
A. H. Belo & Co. v. Smith (Texas S. Ct.), 42 S. W. 850.

The rule is well stated by the Supreme Court of Texas in *A. H. Belo & Co. (supra)*, in the following words:

“The question is: What effect would the publication have upon the mind of the ordinary reader? What construction would he have put upon it? For in defamatory language it is not so much the idea which the speaker or writer intends to convey as what he does in fact convey. It is the effect upon the character of the person alleged to be defamed by the utterance which the law considers, and therefore the utterer uses the language at his peril.”

When Mr. Ickes' press release is examined in the light of these principles, it would seem the conclusion it is defamatory as alleged is inescapable.

While the question of what the appellee intended to convey is not the ultimate test, and his intention is not controlling, determination of that intention should be

quite helpful in construing the language. This would appear particularly true in the instant case, as doubtless we may assume that Mr. Ickes, who holds high position in the Cabinet of the President, possesses the intelligence to in most instances actually convey what he intends.

From the occasion for, and the tone and language of the release, Mr. Ickes' intention here is quite obvious.

It is obvious from the first three paragraphs of the release (R. 3), that the sole occasion that prompted Mr. Ickes to issue it was the fact that appellant had been, and was then, severely criticizing appellee's administration of the Connally "Hot Oil" Act, urging immediate reforms in its administration and legislative action by Congress. It is also obvious from the tone and language of the release that this campaign by appellant to reform the law was irking Mr. Ickes; and that the sole purpose of the release was to embarrass, thwart, discredit, defeat and, if possible, forever end plaintiff's reform campaign.

At the outset of our inquiry as to appellee's intention, it will be noticed that throughout the entire press release he says not one word concerning the merits of appellant's campaign, not one word in defense of the Connally Act or of his administration of it, not one word in denial of any charges or criticisms made by appellant, and not one word of any reasons why the reforms or legislative amendments urged by appellant are not desirable, and not even a word critical of motives prompting his campaign. The fact that the release is so wholly lacking in such matters is quite indicative of the Secretary's true intention.

No one would assert he issued the release without some definite intention in furtherance of its obvious purpose.

But, without saying anything of the merits of appellant's efforts, he writes much solely about appellant Glass. He simply intends to convey to oil operators, Congressmen, and the public something so bad about the character of appellant that no one will henceforth pay any attention whatsoever to his Connally Act reform efforts, regardless of the merits of those efforts; or so that appellant will not dare to continue those efforts. He contrives to entirely dispose of appellant's campaign, which he refers to as a "one man lobby," merely by attacking and defaming his character.

Perhaps more on the subject of Mr. Ickes' intention is unnecessary. But, it may be summed up by the following questions: If such were not his intention, then: Why did he say nothing in defense of the Connally Act or his policies of administration of it? Why in the name of common sense does he comment upon the matter of Appellant's practice-status before his Department, a matter entirely foreign and unrelated to the subject of the release and real occasion which prompted him to speak? Why should he bring that up, unless to do so in a defamatory manner that could be calculated to serve the obvious purposes of his release?

Having disposed of Mr. Ickes' intention, we come to the more important question, which as variously stated is: What does he actually convey? What effect does the publication have upon the mind of the ordinary reader? What is the commonly understood meaning of his language? What meaning would be placed upon it by the average ordinary person who might read it?

In the first paragraph, the important lead paragraph, of the release, he says appellant Glass is a lawyer, and has invited oil operators to contribute to a "lobbying fund"; and he tells oil operators to "investigate" and to "stop, look, and listen"; and he says:

"Mr. Glass has been barred from practice before the Department." (R. 3.)

Appellant contends that in that lead paragraph alone, Mr. Ickes said enough to convey to the "ordinary reader," as well as the whole world, that Mr. Glass had committed some loathsome immoral or unlawful acts. For when the statement is made to any ordinary person that a lawyer "has been barred from practice" before a Government Department, he will just naturally conclude that the lawyer has been "barred" for some such acts.

It may be said that such is the ordinary meaning of such a statement to the average person. In the mind of the ordinary person, there would be no other reasons why a lawyer would be barred from practice before a Department. Surely most persons outside of governmental circles, and even many therein, never heard of the recent and new type regulation of Mr. Ickes prohibiting all employees for two years after leaving the Department (which regulation was cancelled by him June 29, 1939). And even if he had heard of such regulation, the average person would never think of it in considering the above statement standing without some explanation referring to the regulation. Under these considerations there most surely can be no doubt of the defaming meaning actually conveyed to the ordinary reader, when the statement is made under the circumstances of this press release and in connection with the other language warning persons to "investigate" and to "stop, look, and listen." (R. 3.)

The mere fact that a man happened to be a former employee of the Secretary, subjected to a temporary regulation which temporarily prohibited him from practicing before the Department, in the same manner

as all other present and former employees were temporarily prohibited, is surely no reason why the public should be warned to investigate, stop, look, and listen concerning him or his lawful activities. And no ordinary person would so think.

Appellee may urge that, in this case, the sentence "Mr. Glass has been barred from practice before the Department," could not be construed as libelous, for the reason that it is admitted by Mr. Glass that a regulation of Secretary Ickes was applied to him so that he was prohibited from practice before the Department for a period of two years after he resigned from the Federal Tender Board (R. 5, "VI"). (In this connection, this Court doubtless will recall and can take judicial notice that in a recent appeal to it in an equity suit to enjoin the enforcement of this regulation against Mr. Glass, Secretary Ickes immediately after submission of his brief, on June 29, 1939, issued an order cancelling said regulation and suggesting that that cause was then moot.)

Doubtless under literal meaning of the word "barred," it is true that by virtue of the regulation and its application by Ickes all present and former employees of the Department of the Interior and the Connally Act Agencies were "barred" from practice before the Department for the temporary period of two years after leaving such service; and, as Mr. Glass was one of that class, it is the literal truth that "he had been barred from practice." Yet, no one can deny that the broadcasting to the world of this unqualified statement conveys to the public much more than the above truth.

Such statement just naturally conveys an untruth, even though perhaps in a strict literal sense it is true. Owing to the universal manner in which the statement in question is accepted by the ordinary person, par-

ticularly when used in connection with a lawyer, it results in an impeachment of his character.

To convey the truth in the matter to the average person takes more than that statement. To convey the truth when undertaking to tell the status of one of the many employees and ex-employees of the Department, one must say much more than the above bare and unqualified literally true statement. He must say something on this order: "There is (or was) a Departmental regulation which prohibits all of its employees from appearing as agents or attorneys before it for a period of two years after they leave the Department, and, inasmuch as Mr. Glass has been out of the service less than two years, he can not yet practice before it." The truth could be conveyed in various ways—and admittedly in a shorter sentence than that; but never by merely: "Mr. Glass has been barred from practice before the Department."

One wonders what the Solicitor of the Department should think about it, if he should resign to enter private law practice to-morrow, and fourteen months hence Secretary Ickes should release such a statement on him to the press associations and publish it to the world? Surely such a statement would be unfair, unjust, and libelous even though literally true under some such regulation.

But we need not definitely settle the question of whether this sentence, alone, is defamatory. The Secretary preceded it with a warning to "investigate" and followed it with the words, "stop, look and listen." And he was not satisfied to accomplish the defamation with these statements in his lead paragraph. He was obviously determined to leave nothing to the natural imagination of our "ordinary reader." So further on in the release he undertakes to tell in great detail just why Mr. Glass "has been barred from practice."

There he definitely strikes again with the weapon he has chosen to consign appellant and his reforms to oblivion; and there he makes certain of the fatal effect.

He recites that the Secretary of the Interior made a certain regulation regarding practice before the Department and then he says:

"This regulation is to prevent Government employees selling confidential knowledge and experience. Contrary to that regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board."
(R. 4.)

Then he says that Glass prior to his resignation had supervised and recommended action in this "very matter" concerning Mr. Brewer.

There could be no doubt about what these statements mean to the ordinary reader. Clearly one could not act "contrary to" a regulation which "prevents Government employees from selling confidential knowledge," without selling or attempting to sell confidential knowledge. No lawyer could do anything worse than that.

In conclusion upon this point, it is respectfully submitted that the press release was defamatory of appellant, substantially as alleged by innuendo in his Complaint. Such innuendoes are very reasonable inferences from the statements complained of and the facts alleged in connection therewith. And, therefore, it is error to sustain a motion to dismiss upon grounds the press release was not defamatory. More definite determination of the issue is properly a matter for a jury. *Guisti v. Galveston Tribune, supra*; *A. H. Belo & Co. v. Smith, supra*; *Hanchett v. Chestovich, supra*; *Commercial Pub. Co. v. Smith, supra*; and *Culmer v. Canby*, 101 F. 195, 41 C. C. A. 302.

II.

The Defamatory Statements in Appellee's Press Release are Not Absolutely Privileged.

- (a). *The press release is not an official communication published in course of official duty within the meaning of the rule of absolute privilege.*

In the Court below counsel for Appellee contended that a defamatory statement of a head of a Department of the Federal Government is absolutely privileged and affords no cause of action, even though the publication be false, malicious, and wanton and irrespective of motive, if it merely has "some relation to" his official duties, or is made "in relation to" matters committed by law to his supervision, or has "more or less connection with" such matters. And that therefore this release voluntarily given by Mr. Ickes to the press associations of the world and circulated and delivered by him to daily newspapers and to divers individuals throughout the nation, wholly outside official channels, is absolutely privileged regardless of the fact it was highly defamatory, false and deliberately and maliciously published by him for the purpose of destroying appellant's reputation as alleged in the Complaint.

By citations offered in support of such propositions, they sought virtually to establish that the rule of absolute privilege as to public officials is entirely unlimited; that the head of an executive Department of our Government by virtue of his high official position, may say whatever he chooses, anywhere, at any time, about anyone, with absolute immunity.

Such is not the law. If our principles of Government are to prevail, such must never become the law in these United States. The very reasons of public policy upon

which the rule is based forbid that it should be so extensive and unlimited.

There have been many reported cases where in the courts have found public officials were immune from liability for alleged defamatory publications, under the true rule of absolute privilege. As many libel and slander suits against high Federal officials have been brought in the District of Columbia, this Honorable Court has applied the rule numerous times. But after review of reported Supreme Court and other Federal cases and those in high State courts, appellant's counsel submits that there exists no judicial authority, even persuasive, to support the foregoing contentions made in behalf of the appellee.

Generally speaking, an official communication within the rule, is one by a Government official in the course and discharge of official duties imposed upon him by law. That clearly appears to be the effect of the judicial precedents on the subject. Such were the nature of communications passed upon in the following cases. That is all these cases stand for.

Spalding v. Vilas, 161 U. S. 483.

Mellon v. Brewer, 57 App. D. C. 126, 18 F. (2d) 168; Cert. den. 275 U. S. 530.

De Arnaud v. Ainsworth, 24 App. D. C. 167.

Miles v. McGrath, 4 Fed. Supp. 603 (D. C. Md.).

Harwood v. McMurtry, 22 Fed. Supp. 572.

United States v. Brunswick, 63 App. D. C. 65, 69 F. (2d) 383.

Farr v. Valentine, 38 App. D. C. 413.

Smith v. O'Brien, 66 App. D. C. 387, 88 F. (2d) 769.

Nowhere by law or reason has it become the official duty of the Secretary of the Interior to issue statements

to the press or to make speeches in defense of his policies or those of this Administration. The fact that Mr. Ickes has habitually engaged in such activities does not make it any part of his official duty. (Our Constitution and laws do not provide for any "Minister of Propaganda"). If such press release is an "official communication" within the meaning of the rule, then we should say that any communication of a Government official is an "official communication."

In their brief below counsel for appellee endeavored to show that the press release was "an incident to" or in "relation to" the performance of official duties of the Secretary of the Interior under the Connally "Hot Oil" Act, by reference to certain provisions of that Act and Executive Orders of the President thereunder. But, it is submitted, careful study of the whole Act and all Orders under it reveal no slight indication of any such official duties. Nowhere in that Act is the Secretary charged with any duty of preventing persons from legitimately lobbying for reforms or amendments in the Connally Act; or protecting oil operators from lobbyists. Nowhere under any law is it the duty of the Secretary to publicly defame the character of conscientious objectors to this or any other Act of Congress.

In many of the above cases the opinions supporting decisions applying the rule of absolute privilege are quite lengthy. They contain unnecessary expressions of opinion (one might say loose opinions) of the judges, which are obiter dicta. When isolated, some of these might be construed as supporting the contentions of Mr. Ickes' counsel concerning matters "relative to" or "in connection with" or "incident to" official duties, if we did not take pains to carefully examine the cases in which they were uttered.

In the District Court below, appellee's counsel quoted

much of such dicta from these cases. In order that same may be readily recognized if submitted in this appeal, the following brief analysis of some of the libel cases precedent are here submitted.

In *Spalding v. Vilas, supra*, the leading case by the Supreme Court, the communication under consideration was a circular letter by the Postmaster General to postmasters, enclosing to them, pursuant to Acts of Congress, warrants for claims due them for adjusted salary. The facts of the case, and limits of the rule as there applied by the Court are fully revealed by the following from the opinion:

“It results that the Postmaster General not only had the right, but it was his duty, to cause all cheques or warrants, issued under the authority of the above Acts of Congress to be sent directly to the claimants * * * No one could rightfully complain that the Postmaster General called the attention of those having business with his Department to an Act of Congress that related to that business and which would explain any cheques or warrants, in their favor, were sent directly to them and were not delivered to agents. * * *

“Whatever may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a Department, it is clear—and the present case requires no more to be determined—that he can not be held liable in a civil suit for damages on account of official communications made by him pursuant to an Act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action, for personal motives can not be imputed to duly authorized official conduct.”

In *United States v. Brunswick, supra*, it was a state-

ment respecting the plaintiff, contained in a Consul's confidential report to the State Department, concerning persons engaged in business in his district, in performance of official duty under a Federal Statute and under orders of his Department. There was no general publication of the statements complained of; they were communicated in confidence to the Consul's superiors.

In *Farr v. Valentine*, *supra*, it was a statement in a letter from the Commissioner of Indian Affairs to the Secretary of Interior recommending dismissal of an employee of the Indian Bureau on the grounds of unfitness for his position.

In *De Arnaud v. Ainsworth*, *supra*, it was an official report of the Record and Pension Office to the Secretary of War made under Departmental regulations. The law of that case is revealed by the following from the opinion:

"Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in course and discharge of official duty."

In *Mellon v. Brewer*, *supra*, the communication was a report by the Secretary of the Treasury to the President. This was a hard case. A copy of the report reached a newspaper. It was a borderline case, and the opinion indicated the Court so recognized it. Moreover, it appears extremely doubtful that the statements in the report, alleged to be defamatory, were actually so. The result reached was correct. The Court here definitely took pains to reveal that the rule of absolute privilege is a limited one. The Court said:

"Absolute privilege such as that of the Courts in acts by them in course of their official functions—

by reason of the same general considerations of policy—applies to a large extent to the official communications made by heads of executive departments engaged in the discharge of duties imposed upon them by law.”

The Court in that case also quite definitely limited the rule to statements germane to the occasion or subject-matter of the communication. Further quotation from the opinion on that point is set out herein, *infra*, under sub-point “(b).”

In *Miles v. McGrath*, *supra*, the communication was an official report of a naval officer to his superiors pursuant to orders. The Court there affirmed the following as embracing a correct statement of the law.

“That a naval officer’s communications are absolutely privileged, regardless of the motive, provided they are: first, authorized by law; second, made in the course of duty; and, third, the statements complained of are germane to the subject matter involved in the communications.”

Then the Court says:

“Therefore the question before the Court simply is: Do these three prerequisites exist in the present case?”

In *Harwood v. McMurtry*, *supra*, it was an official report of an Internal Revenue Agent to his superior in discharge of official duty. The Court stated the question involved as follows—and then answered it affirmatively:

“Whether the law affords a public officer absolute protection and immunity from liability on account of a false statement maliciously made in a communication to his superior in the course

of, and discharge of, official duties pertinent and relative thereto."

In *Smith v. O'Brien, supra*, the plaintiff complained of comments by the Chairman of the Tariff Commission, when the plaintiff called upon him for an endorsement. The incident occurred at the defendant's office where he conferred with persons having business with the Commission. The comment was made in reply to the plaintiff's request for endorsement or assistance, after the defendant had read documents submitted to him by plaintiff.

Thus, it is obvious that any comments from the opinions in the above libel cases, which appellee's counsel may present in support of their contention that the press release of the instant case was absolutely privileged, must be relegated to the realm of dicta, of very little, or no, persuasive authority.

The appellee's counsel in the court below, after asserting that the "absolute privilege to publish libel has its source in the general immunity of public officials from liability to pay damages for acts performed in line of duty," quoted from:

Cooper v. O'Connor, 99 F. 2d 135.

Standard Nut Co. v. Mellon, 63 App. D. C. 339,
72 F. 2d 557; Cert. den. 293 U. S. 605.

There, also, an examination of the cases reveals that whatever they find which they believe might aid them must be obiter dicta, for the law therein limits the rule of immunity in such a manner it could not cover the instant case.

Cooper v. O'Connor, supra, was a suit against officers of the United States for a malicious prosecution, by indictment. The Court, in concluding the opinion, said:

"Therefore, we conclude that as the acts of appellees were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial, and appellant's contention must fail."

In *Standard Nut Co. v. Mellon*, *supra*, the plaintiff claimed that its product was not legally taxable as oleomargarine, and that the defendants without authority of law capriciously and maliciously demanded the tax and injured its business. Although the Court here made a comment containing the words "in relation to matters," the same was not necessary to the decision reached. The law of that case is indicated by the following from the opinion:

"It is true the commissioner construed the statute erroneously, but nevertheless the subject-matter of the assessment was within his jurisdiction and authority. In such case error on his part does not expose him to an action for damages * * *

"If the Secretary of the Treasury may lawfully be brought to trial before a jury upon a claim for damages because of an erroneous assessment of taxes, whenever it is charged that his action was arbitrary, capricious, and malicious, it would expose such officer to a risk which is contrary to public policy."

- (b) *The defamatory statements in the appellee's press release are wholly unrelated and foreign to the subject-matter of the release and wholly unnecessary to accomplish any lawful purpose relative to the occasion for the release.*

Even in cases of official communications in performance of official duty, the rule of absolute privilege has

been definitely limited to statements which are germane to the subject-matter of the communication.

If Mr. Ickes had said in an official communication just what he did say in his press release, the defamatory statements complained of would not have been privileged. In some of the above listed cases, as well as in others, great care was taken by the courts to find that the defamatory matter in the official report or communication involved was not wholly unrelated and foreign to the subject-matter of the communication. In other of the above cases the courts by their language have definitely indicated the limits of the rule in this regard. The following quotations are of interest.

From *De Arnaud v. Ainsworth, supra*:

“Of course, when a party steps aside from duty and introduces into his report or communication defamatory matter wholly irrelevant and foreign to the subject of the inquiry, a different question is presented.”

In *Miles v. McGrath, supra*, the court in stating there are three prerequisites necessary to afford absolute privilege, states:

“And, third, the statements complained of are germane to the subject-matter involved in the communication.”

In *Mellon v. Brewer, supra*, the Court very thoroughly examined into this question before holding that the alleged defamatory statements in the communication there involved was absolutely privileged. The Court cites with approval the above quotation from *De Arnaud v. Ainsworth* and disposes of the question in the case before it with the following language:

"But it is insisted, even if it be assumed that the report to the President was of an official character, the Secretary has interjected defamatory matter wholly irrelevant and foreign to the subject under discussion, so that there has been such abuse of the privilege as to place the communication beyond the rule and to destroy the general immunity. The basis for this contention is the challenge of plaintiff's good faith and the characterization of the charges as unfounded. When it is considered that after the plaintiff had been engaged in conducting an investigation for a period of almost three years, and had not, according to the Secretary, progressed beyond the point of suspicion and deduction; that the President had designated a disinterested and presumably capable attorney to consult with Mr. Brewer and ascertain what facts he had developed, after which Mr. Brewer had requested three additional months, and thereafter submitted a report to the Attorney General, which, in view of the Secretary, contained no evidence justifying the charges; that this report was referred to the Treasury; that the Secretary answered the report in detail, stating that out of approximately \$100,000,000,000, principal amount of securities retired by the Register of the Treasury during the period 1917 and 1922, there had been a loss of only \$13,000; that, notwithstanding all this, the plaintiff persisted, and inspired a congressional investigation, according to the Secretary, by a committee for which he was counsel; that no opportunity was offered the Treasury to cross-examine witnesses or make explanation or defense—we say that, when all these circumstances are considered, the reasons for the Secretary's comment became apparent. The communication relates exclusively to the charges, to the plaintiff's connection therewith, and to the views of the Secretary as to the absence of any real foundation for such charges."

The subject-matter or occasion for Mr. Ickes' press

release in the instant case is the fact, as recited by him, that Mr. Glass is engaged in efforts to secure reforms and amendments in the Connally "Hot Oil" Act for the purpose of eliminating discriminations against the small units in the oil industry and that plaintiff had invited others interested to contribute to a fund to further those efforts (R. 3).

Upon describing the above efforts (the subject-matter or occasion of the release), the defendant neither says nor undertakes to say a single thing about the merits of these efforts. He entirely abandons the subject-matter or occasion which prompted him to issue the release. He simply makes that occasion an excuse to defame and impeach the character of appellant, in a matter wholly unrelated and foreign to that occasion. There exists no relation between that occasion and any barring of appellant from practice before the Department.

III.

CONCLUSION.

This is what the Record reflects: Mr. Glass, within rights guaranteed all citizens by our Constitution, criticized the policies of a Federal law and petitioned Congress to amend it. Mr. Ickes did not like this. Perhaps the policies were indefensible; at any rate, Mr. Ickes said nothing in their defense. He lost his temper, and maliciously broadcast to the world a vituperative false press release defaming the character of Mr. Glass. Then, when Glass sought vindication in the Courts, Mr. Ickes ran for cover under the rule of absolute privilege which exists only for the protection of officials in their strictly official-duty communications.

Secretary Ickes had a lawful right, not a legal duty,

to reply through the press or otherwise to Mr. Glass' criticisms of the Connally Act and the Secretary's administration of it. The same right that appellant or any other citizen has to criticise policies of our Government or governmental officials. In exercising such right, without malice, he could have said many things which he may believe, even though they were untrue, so long as they were germane to the occasion. In such fair reply or retort, he would have been adequately protected by the rule of "conditional privilege."

He had a right to speak, but he abused it beyond the scope of any manner of privilege.

The rule of absolute privilege as applied to the facts in judicial precedent, and as therein limited, is a good one, based upon sound public policy. But, if it should be expanded to cover facts such as those of this case, the rule will become an evil doctrine destructive of the public interests and contrary to our democratic principles.

There are two important considerations of public policy involved. One, the protection of the individual citizen from arbitrary, unjust, and oppressive official action; and the other, the protection of the public by protecting their governmental officials in the performance of their official duties. There exists no serious conflict between these two considerations, under the law of "absolute privilege" as actually applied in the leading judicial precedents.

Appellant is impressed with a feeling that the outcome of this appeal is a matter of grave public interest, involving a most important civil liberties issue. Here it would seem the court must again recognize the limits of the rule of "absolute privilege," or declare it has none.

In this age of the radio and great efficiency of the press, with our "press conferences" and "radio fireside

chats" of high governmental officials, words can become great weapons for oppressive abuse of power, unless our courts continue watchful for encroachments.

In this Republic high public officials usually have the respect of the majority of the people and are believed by them. Denials by an obscure citizen of any maliciously false defamatory public charges made against him by one of these officials serves no purpose. His only hope for protection or relief is the right to seek vindication by a jury.

When we examine into the contentions of appellee's counsel, to the effect all manner of statements by a public official, made in "relation to" matters under his supervision, are absolutely privileged, the evils of such a doctrine become quite obvious. Under such a rule if a citizen should justly criticize any policies of one of our Federal officials or the Federal Administration and urge appropriate reforms, any official of vituperative tendencies, having no defense for the indefensible policies, could destroy the objector and his worthy efforts by vicious false defamatory press and radio releases to the world attacking the objector's character; and secure absolute immunity merely by making some slight reference in the releases to some matter under the official's supervision.

If such is to be the law, who would dare exercise our cherished right of free speech for the purpose of protesting against policies of government, regardless of how destructive those policies may be?

It must not be forgotten, that wherever power is reposed there exists danger of abuse of power.

In this era of Naziism, Fascism, and Communism, it appears that in parts of the civilized world there has been a revival of those Middle Ages doctrines which placed the rulers above the law; and were to effect the

heads of government could do no wrong. It is said that in Germany under Hitler, those who criticize his policies are gathered into concentration camps, from which the corpses of many are returned to their home with "suicide" notices. To clothe the heads of our Government with absolute power to libel, would be a step in that same direction.

Good citizens cherish their good characters and reputations more than their liberty, or even their lives.

Mr. Ickes' press release was highly defamatory and was not absolutely privileged. The judgment of the District Court should be reversed.

JOHN D. GLASS,

The Appellant.

CLAUDE L. DAWSON,

Attorney for the Appellant.

FILED JAN 30 1940

No. 7460

Joseph W. Stewart

CLERK

**In the United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1939

JOHN D. GLASS, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

BRIEF OF APPELLEE

NATHAN R. MARGOLD,

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FREDERIC L. KIRGIS,

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Department of the Interior,

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In the United States Court of Appeals for the District of Columbia

APRIL TERM, 1939

No. 7460

JOHN D. GLASS, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLEE

BRIEF OF APPELLEE

INTRODUCTORY STATEMENT

This is an appeal by John D. Glass, plaintiff below, from a final judgment of the District Court of the United States for the District of Columbia, per Judge Cox, entered May 18, 1939, granting appellee's motion to dismiss, and dismissing a libel action for \$750,000 against the Secretary of the Interior.

JURISDICTIONAL STATEMENT

The statutes upon which the jurisdiction of the court below is based are found in Title 18, sections 43 and 44 of the Code of the District of Columbia (1929 ed.). The jurisdiction of this court is invoked upon the basis of the statutes set forth in Title 18, section 26 of the Code of the District of Columbia (1929 ed.).

STATEMENT OF CASE

In his statement of the case, the appellant has erroneously assumed that for the purposes of the motion to dismiss, the only facts to be considered are those set forth in the amended complaint. He has not mentioned nor taken into consideration facts which the court may judicially notice and consider in passing on a motion to dismiss. *Fletcher v. Jones*, 105 F. (2d) 58 (App. D. C. 1939); *Greeson v. Imperial Irrigation District*, 59 F. (2d) 529, 530 (C. C. A. 9th, 1932).

This court will judicially note the appellee's official capacity, the extent of his authority and the scope of his duties. *Cooper v. O'Connor*, 99 F. (2d) 135, 69 App. D. C. 100 (1938), *cert. den.*, 305 U. S. 642 (1938); *Cooper v. O'Connor*, 99 F. (2d) 143, 69 App. D. C. 108 (1938); *Mellon v. Brewer*, 18 F. (2d) 168, 57 App. D. C. 126 (1927), *cert. den.*, 275 U. S. 530 (1928).

The amended complaint alleges that the appellee is the Secretary of the Interior (R. 2, par. II). The court will judicially notice the fact that he held that office at all the times mentioned in the amended complaint. And appellant's brief impliedly concedes this to be the fact (pp. 17, 18).

The court will judicially notice that at the same times, the appellee was charged with the duty of administering the Connally "Hot Oil" Act (act of February 22, 1935, c. 18, 49 Stat. 30, as amended; Sec. 715, *et seq.*, Tit. 15, U. S. C.), the statute authorizing the regulation of the recognition of agents and attorneys before the Department of the Interior (act of July 4, 1884, c. 181, 23 Stat. 101; Sec. 493, Tit. 5, U. S. C.), and the then subsisting

departmental regulation 8—a prohibiting ex-employees of the Department from practicing before it for two years after termination of such employment (54 I. D. 194 (1935)). These are more fully hereinafter set forth (pp. 14-18).

The complaint alleges the wilful and malicious publication by the appellee on November 23, 1938, of a press release (R. 2-4), which follows:

UNITED STATES

DEPARTMENT OF THE INTERIOR

MEMORANDUM FOR THE PRESS

For Release November 23, 1938

Oil operators being “personally” invited on a “strictly confidential” basis to contribute some \$5,000 to an oil lobbying fund sought by John D. Glass, Tyler, Texas, lawyer, were advised by Secretary of the Interior Harold L. Ickes today to investigate.

Making information which had come to him public, Secretary Ickes said:

“Mr. Glass has been barred from practice before the Department. The Courts to date have refused Mr. Glass’ prayer that this action be enjoined. I suggest that oil operators given an opportunity by Mr. Glass to kick in to his fund stop, look, and listen before they finance this proposed one-man lobby.”

The present letters are being circulated under Mr. Glass’ professional letter head and over his signature reciting that he is engaged in an effort to secure “immediate reforms in the Connally Hot Oil Act enforcement” to eliminate what he

describes as "discriminations." These letters which go to oil operators set forth that he desires legislation to benefit various persons engaged in the oil business including "small independent units." He also advocates legislation to end prosecuting violators under felony statutes and substitute misdemeanor prosecutions. Mr. Glass states that he proposes to enlist senators and representatives in support of his proposals, and recites that he has gotten certain publications to support his stand and concludes:

"I have much personal interest in this matter and had intended to pursue it without any material financial assistance. But my present income is so limited that it now appears that to properly carry forward this campaign will require help to the extent of about \$5,000. I am therefore writing this to you and to several other oil operators who, I believe, should be interested. I ask that you please give it your careful consideration, and if you believe my efforts are worth while, that you kindly communicate to me any suggestions you may have to offer as to how I might acquire the needed funds.

"The source of any assistance offered will be kept strictly confidential as will any communication from you in the matter."

The record shows that prior to September 15, 1937, Mr. Glass was chief investigator of the Federal Petroleum Agency No. 1 in the Department of the Interior, the investigative agency of Federal Tender Board No. 1. Effective September 15, 1937, he resigned his position in order to practice law at Tyler, Texas. A Departmental regulation promulgated by Secretary Ickes in March of 1933 provides that no ex-employee of the De-

partment may practice before the Department or any of its agencies or boards for two years after his services with the Department are terminated. This regulation is to prevent Government employees selling confidential knowledge and experience. Contrary to such regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board. Prior to his resignation Mr. Glass had supervised a matter in which Mr. Brewer was concerned and had initialed and signed memoranda to his superior, the Director of the Federal Petroleum Agency in which he had recommended that certain action be taken. After Mr. Glass resigned Mr. Brewer was subpoenaed by the Federal Tender Board to appear before the Board and testify in this very matter.

When these facts were called to the attention of the Secretary of the Interior, he pointed out to the Federal Tender Board the existence of the Departmental regulation and instructed the Federal Tender Board that it be governed thereby in the event any former employee should appear before the Board. Mr. Glass was thereafter prevented from practicing before the Board.

He commenced an action in the United States District Court in Texas against the Federal Tender Board, attempting to enjoin the Board from preventing him from practicing before it. That action was dismissed for failure to serve Secretary Ickes as a defendant. Thereupon Glass brought an action in the United States District Court for the District of Columbia against Secretary Ickes and the Director of the Petroleum Conservation Division to enjoin them from enforcing the Departmental regulation

and preventing him from practicing before the Federal Tender Board.

Among the grounds urged by Glass for the issuance of an injunction were the lack of authority of the Secretary to promulgate the regulation, its unreasonableness, its unconstitutionality, and that it was being unfairly applied to him. He moved the Court for a preliminary injunction, but the motion was denied by Judge Bailey who held that the Secretary was authorized to promulgate the regulation, and that it was reasonable. [R. 3-5.]

This statement is alleged to be false and defamatory insofar as it relates to the barring of appellant from practice before the Federal Tender Board, in that he "did not do anything contrary to, or in violation of any regulation promulgated to prevent Government employees from selling confidential knowledge; and plaintiff did not represent said Everett Brewer or attempt to represent him, in any matter or proceeding before said Federal Tender Board upon which he had acted or passed upon when previously employed by the Government; and the plaintiff did not sell or attempt to sell any confidential knowledge obtained by him while employed by the Government." (R. 5.)

SUMMARY OF ARGUMENT

The judgment of the District Court should be affirmed because the amended complaint does not state a cause of action.

(1) The appellee as Secretary of the Interior is accorded the absolute privilege to publish defamatory

statements if they relate to matters committed by law to his control or supervision. The allegedly defamatory press release in this case is related to matters committed by law to the control and supervision of the appellee as Secretary. This affirmatively appears from facts set forth in the complaint and from facts which the court may judicially notice. Moreover, the complaint fails to allege that the issuance of the release was beyond the authority of the appellee, and in order to maintain the action it was essential that the complaint make such allegation.

(2) The press release is not defamatory. It cannot reasonably be said to have the meaning suggested by appellant. This appears from the face of the complaint in which the press release is set forth in full. And so, apart from the absolute privilege, the amended complaint fails to state a cause of action.

ARGUMENT

POINT I

The amended complaint is insufficient as a matter of law because the Secretary of the Interior is accorded the absolute privilege to publish defamatory statements if they relate to matters committed by law to his control or supervision

A defamatory statement by the head of an executive department of the Government of the United States with relation to or in connection with matters committed by law to his control or supervision is absolutely privileged, regardless of the motive with which the statement is published.

- Spalding v. Vilas*, 161 U. S. 483 (1896);
Mellon v. Brewer, 18 F. (2d) 168, 57 App. D. C. 126 (1927), *cert. den.*, 275 U. S. 530 (1928);
De Arnaud v. Ainsworth, 24 App. D. C. 167 (1904);
Farr v. Valentine, 38 App. D. C. 413 (1912);
United States v. Brunswick, 69 F. (2d) 383, 63 App. D. C. 65 (1934);
Smith v. O'Brien, 88 F. (2d) 769, 66 App. D. C. 387 (1937);
Miles v. McGrath, 4 Fed. Supp. 603 (D. Md. 1933);
Collett v. Collier, Dist. Ct. D. C., Law No. 85496, defendant's motion for a summary judgment granted March 3, 1939, appeal pending in this court;
Lerch v. Carter, Smith v. Carter, Rennie v. Carter, Dist. Ct. D. C., Law Nos. 85144, 83306, 83574;
Jones v. Kennedy, et al., Dist. Ct. D. C., Law No. 90205, complaint dismissed Oct. 6. 1939, appeal pending in this court;
 3 Restatement of Law of Torts (1938) 238.

The leading case is *Spalding v. Vilas*, 161 U. S. 483 (1896), in which the facts are strikingly similar to those in this case. Spalding, an attorney, represented certain postmasters having claims against the Post Office Department. The Postmaster General, without specific statutory authority so to do, circularized Spalding's clients, calling their attention to a law which made unnecessary the services of an attorney in the collection of their claims. Alleging that the Postmaster General's action was not only unauthorized by law and beyond the scope of his official duties but was done

maliciously in order to injure him, Spalding brought suit for damages, including a count for injury to his reputation. In affirming a judgment sustaining a demurrer to the declaration, Mr. Justice Harlan, speaking for a unanimous court, said:

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, *we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision.*

* * * In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not

always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law. [161 U. S. 498, 499, italics supplied.]

In 3 Restatement of the Law of Torts (1938) 238, the rule and the compelling reasons for its adoption are stated as follows:

SEC. 591. *Executive Proceedings.*

The President of the United States and the Governor of any State or Territory thereof, cabinet officers of the United States and the corresponding officers of any State or Territory thereof are absolutely privileged to publish false and defamatory matter of another in the exercise of an executive function, if the matter has some relation to the executive proceeding in which the officer is acting.

Comment:

a. Complete freedom in performing the duties of the important executive offices of the Nation and State requires the absolute privilege to pub-

lish defamatory matter of others when such publications are incidental to the performance of the duties of the office. The public welfare is so far dependent upon a reasonable latitude of discretion in the exercise of functions of high executive offices that the incumbents thereof may not be hindered by the possibility of a civil action for defamation in connection therewith.

In *Mellon v. Brewer*, 18 F. (2d) 168, 57 App. D. C. 126 (1927), *cert. den.*, 275 U. S. 530 (1928), this court had before it a case substantially like this one. There the Secretary of the Treasury released to the newspapers a letter addressed to the President, in which he commented on charges made by Brewer against the administration of certain phases of the work of the Treasury Department. Brewer contended that even if it be assumed that the letter was of an official character, the Secretary had sent it to the newspapers for publication and had interjected in the letter defamatory matter which was wholly irrelevant and foreign to the subject under discussion, and that therefore there had been such an abuse of the privilege as to place the publication beyond the rule of immunity. This court reversed the judgment of the district court overruling a demurrer to the declaration.

The absolute privilege to publish a libel as long as the publication is an incident to the performance of official duties stems from the broader rule that public officials enjoy a general immunity from liability to pay damages for acts performed in the line of their duties.

Cooper v. O'Connor, 99 F. (2d) 135, 69 App. D. C. 100 (1938), *cert. den.*, 305 U. S. 642 (1938);

Cooper v. O'Connor, 107 F. (2d) 207 (App. D. C. 1939), *cert. den.*, 60 Sup. Ct. 263 (1939);
Standard Nut Margarine Co. v. Mellon, 72 F. (2d) 557, 63 App. D. C. 339 (1934), *cert. den.* 293 U. S. 605 (1934).

In the first *Cooper v. O'Connor* case the court held that demurrers to a declaration in malicious prosecution against Federal officials were properly sustained on the basis of immunity from suit, despite allegations that the acts complained of were wanton and malicious. It was held "that as the acts of appellees were performed in the discharge of their official duties the motives with which those duties were performed are immaterial * * *." The court further held (99 F. (2d) 135, 139, 69 App. D. C. 100, 104):

It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (*United States v. Birdsall*, 233 U. S. 223, 230–231, 34 S. Ct. 512, 58 L. Ed. 930); or even that they should be specifically directed or requested by a superior officer. *Mellon v. Brewer*, 57 App. D. C. 126, 129, 18 F. 2d 168, 171, 153 A. L. R. 1519, certiorari denied, 275 U. S. 530, 48 S. Ct. 28, 72 L. Ed. 409. It is sufficient if they are done by an officer "*in relation* to matters committed by law to his control or supervision." [Italics supplied.] (*Standard Nut Margarine Co. v. Mellon*, 63 App. D. C. 339, 341, 72 F. 2d 557, 559, certiorari denied, 293 U. S. 605, 55 S. Ct. 124, 79 L. Ed. 696); or that they have "*more or less connection with* the general matters committed by law to his control or supervision." [Italics supplied.] (*Spalding v. Vilas*, 161 U. S. 483, 498, 16 S. Ct.

631, 637, 40 L. Ed. 780; and see *Lang v. Wood*, 67 App. D. C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

Standard Nut Margarine Co. v. Mellon, *supra*, is closely in point. There damages were sought from the Secretary of the Treasury for wrongfully assessing a tax on plaintiff's product. It was alleged that the Secretary had continued to interfere arbitrarily and oppressively with the business of plaintiff after the Supreme Court had determined that the plaintiff's product was not subject to the tax. In affirming the judgment of the lower court sustaining a demurrer to the declaration, this court pointed out that the product was not taxable under the statute and that the Secretary had no right to assess the tax. Nevertheless, it was held, in substance, that inasmuch as the acts complained of were performed by the Secretary in relation to matters committed by law to his control and supervision, he could not be held personally liable in damages. This court said (72 F. (2d) 557, 559, 63 App. D. C. 339, 341):

* * * We are of the opinion that the defendants are not personally liable in damages for their erroneous construction and application of the statute. We think the case is governed by the rule that the head of an executive department of the United States government cannot be held in damages for acts done by him in relation to matters committed by law to his control or supervision * * *. In such case error on his part does not expose him to an action for damages, and this is nonetheless true even though his

error be described as arbitrary, capricious, and malicious.

It is significant that in the 150 years during which the Federal Government has existed, there does not appear to be a single case in which a cabinet or subcabinet officer has been held personally liable in a defamation action or for that matter for any action taken in connection with his official duties. Appellant does not cite in his brief a single case in which such liability has been imposed and an exhaustive search reveals none. The appellant, instead, merely quotes from case after case in which every effort to assert such liability has failed.

In the light of these settled rules of law, does the amended complaint in this case state a cause of action? We contend it does not, (a) because it affirmatively appears from facts alleged therein and which the court may judicially notice that the press release was related to matters committed by law to the control and supervision of the appellee as Secretary of the Interior, and (b) because of the absence of any allegation that the publication of the release was beyond his authority.

A. The entire press release relates to matters committed by law to the control and supervision of the Secretary of the Interior

Two matters committed by law to the control and supervision of the Secretary of the Interior are the administration of the Connally "Hot Oil" Act (act of February 22, 1935, c. 18, 49 Stat. 30, as amended; Sec. 715, *et seq.*, Tit. 15, U. S. C.), and the regulation of the recognition of attorneys practicing before his Department (act of July 4, 1884, c. 181, 23 Stat. 101; Sec. 493, Tit. 5, U. S. C.).

The Connally Act is by its terms designed to encourage the conservation of crude oil and to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon such commerce caused by contraband oil. Sec. 1. Contraband oil is defined as petroleum produced, transported or withdrawn from storage in excess of amounts permitted under the laws of a State. Sec. 2. The shipment of contraband oil in interstate commerce is prohibited and administrative machinery is provided for the control of such shipment and transportation, including the requirement of certificates of clearance and the creation of boards to issue them. Secs. 3, 4, 9. The act delegates the power to administer its provisions to the President, but section 11 expressly authorizes a sub-delegation. It provides that whenever reference is made therein "to the President such reference shall be held to include, in addition to the President, any agency, officer, or employee who may be designated by the President for the execution of any of the powers and functions vested in the President under this chapter." Sec. 11.

The amended complaint herein alleges that the appellee is the Secretary of the Interior (R. 2). By executive orders, the President did "designate and appoint the Secretary of the Interior as an agent of the President to execute all of the powers and functions vested in the President by the act" with certain exceptions not here material. Executive Orders Nos. 6979, February 28, 1935, and 7756, December 1, 1937, 2 Fed. Reg. 2664 (1937). Three agencies of the Department

of the Interior connected with the administration of the Connally Act are mentioned in the press release: Federal Tender Board No. 1, Federal Petroleum Agency No. 1, and the Petroleum Conservation Division. The first two were created by orders of the Secretary of the Interior, approved by the President. Order No. 6980c, March 1, 1935; Order No. 7024b, April 25, 1935; and Order No. 7758, December 1, 1937, 2 Fed. Reg. 2669 (1937). The function of the Board is to approve certificates of clearance of oil in interstate commerce; that of the agency, no longer in existence, was to make investigations of applications for such certificates, to present evidence before the Board, and in other respects assist in the administration of the act. The Petroleum Conservation Division was created by the Secretary to assist him in administering the act and under his direction to supervise the operations of the Board and the Agency. Secretary's Orders Nos. 1054, March 14, 1936; 1057, March 31, 1936.

With respect to the recognition of attorneys appearing before the Department, Section 5 of the Act of July 4, 1884) c. 181, 23 Stat. 101; Sec. 493, Tit. 5, U. S. C.), provides:

That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications

to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

On March 24, 1933, the Secretary of the Interior promulgated the regulation referred to in the press release (54 I. D. 194).¹

It provided:

No person who has been employed or has held any office or place of trust or profit in the Department of the Interior shall be permitted to practice, appear, or act as an attorney or agent in any case, claim, contest or other proceeding before the Department or before any bureau, board, division or other agency thereof, until two years shall have elapsed after the separation of the said person from the said service; and no attorney or agent admitted to practice before the Department shall employ or retain any such person for the purpose of making any personal appearance in any such case, claim, contest or other proceeding, before the expiration of the said two-year period.

¹ This regulation was on June 29, 1939, superseded; see *Glass v. Ickes*, 107 F. (2d) 259 (App. D. C., 1939).

Does the press release relate to these matters committed to the Secretary's control and supervision? We think the contents of the release, which appears in full in the complaint (R. 3-5), make it transparently clear that it does. There is nothing in the release which is not related either to the administration of the Connally Act or the recognition of attorneys before the Department, or both. The subject matter of the release is twofold: (1) a letter sent by the appellant to oil operators soliciting "about \$5,000" to finance his efforts to secure "immediate reforms in the Connally Hot Oil Act enforcement"; (2) the barring of appellant from appearance before the Federal Tender Board as an attorney for two years after the termination of his employment with the Department pursuant to regulation 8-a, and of his unsuccessful efforts to prevent that result by way of injunction suits.

It thus affirmatively appears from facts alleged in the complaint and those the court may judicially notice that the entire contents of the release are related to matters committed by law to the appellee's control and supervision. Moreover, in his brief the appellant in effect concedes this, for he does not argue the contrary. Hence the authorities heretofore cited compel the conclusion that the absolute privilege applies and the complaint fails to state a cause of action.

B. The amended complaint does not allege that the publication of the press release was beyond the authority of the Secretary of the Interior

Moreover, the complaint contains no allegation that the publication of the release was beyond the authority of the appellee. Because the acts of a public official

are presumed to have been done within the scope of the authority conferred upon him by law, a complaint in an action for damages against him must allege that the particular act complained of was beyond his authority and in no way connected with his duties.

Cooper v. O'Connor, 99 F. (2d) 135, 69 App. D. C. 100 (1938), *cert. den.*, 305 U. S. 642 (1938);

Cooper v. O'Connor, 107 F. (2d) 207 (App. D. C., 1939), *cert. den.*, 60 Sup. Ct. 263 (1939);

Miles v. McGrath, 4 Fed. Supp. 603 (D. Md. 1933);

Norris v. United States, 257 U. S. 77 (1921);

Keyser v. Hitz, 133 U. S. 138 (1890);

MacKusick v. Johnson, 3 F. (2d) 398 (C. C. A. 1st, 1924).

In *Cooper v. O'Connor*, 107 F. (2d) 207 (App. D. C. 1939), the lower court dismissed a suit for an accounting brought against various public officials connected with the receivership of a national bank. Among the allegedly unlawful acts of the defendants was the payment of \$12,000 in the settlement of a lawsuit. In affirming the judgment of the district court, this court said:

In respect of the payment of \$12,000 to "Rhodes or his attorneys": The bill does not specifically charge that the act of merging the two suits and securing a stay or abandonment of the Rhodes suit and the paying of \$12,000 in connection therewith was outside the scope of the defendants' duties as officials. And it does not otherwise appear from the bill that what was done was outside the scope of their duties, espe-

cially as it appears that the \$12,000 was paid to a depositor or his attorney. Since no cause of action to charge a public officer personally arises unless he is acting beyond the scope of official duty, a pleader seeking to state a cause of action against such an officer must allege that he has transcended his authority. [107 F. (2d) 207, 209-210.]

Inasmuch as the press release here involved was issued by appellee while Secretary of the Interior and purported on its face to have been issued in the discharge of the duties of his office, it was essential that the complaint state facts showing that his authority was thereby exceeded. The complaint lacks any such allegations and consequently for this reason as well fails to state a cause of action.

However, appellant in his brief argues that "The press release is not an official communication published in course of official duty within the meaning of the rule of absolute privilege" (Subtitle (a), point 2, p. 16). From the discussion that follows, it seems that this means that, first, there is something about a press release that distinguishes it from other forms of communication (pp. 16, 17, *et seq.*), and, secondly, that there was no specific statutory duty to issue this particular press release (p. 18). The answer to the first contention is that the form of the communication is immaterial. The answer to the second is (a) that no specific statutory authority is required, and (b) that the question of authority may not be raised in the absence of an allegation to that effect in the complaint.

The appellant cites no case supporting his contention that a press release is distinguishable from other forms

of communication. There are, in fact, cases in this court, in the court below, and in other courts to the contrary.

Mellon v. Brewer, 18 F. (2d) 168, 57 App. D. C. 126 (1927), *cert. den.*, 275 U. S. 530 (1928);
Smith v. Carter, Dist. Ct. D. C., Law No. 83306;
Jones v. Kennedy et al., Dist. Ct. D. C., Law No. 90205;
Howland v. Maynard, 159 Mass. 434, 34 N. E. 515 (1893);
McAllister & Co. v. Jenkins, 214 Ky. 802, 284 S. W. 88 (1926);
Trebilcock v. Anderson, 117 Mich. 39, 75 N. W. 129 (1898);
Adams v. Ward (1917), A. C. 309, Ann. Cas. 1917D, 249.

In *Mellon v. Brewer*, *supra*, the point was specifically raised by the plaintiff. In the opinion it was said: "Counsel for the plaintiff * * * contend first, that, even if the letter was an official communication, the Secretary exceeded any privilege he might have had by sending it to the newspapers for publication * * *." 18 F. (2d) 168, 171, 57 App. D. C. 126, 129. While the court did not expressly discuss this point, the fact remains that despite the publication to the newspapers the order of the District Court overruling the demurrer was reversed.

In *Smith v. Carter*, *supra*, the defendant, the Government Printer, was charged with publication of defamatory statements contained in the files of his office by showing them to a newspaper columnist. Justice O'Donoghue directed a verdict on plaintiff's opening statement on December 16, 1934. In *Jones v. Kennedy*,

et al., supra, one of the allegations of the complaint was that the defendants, members of the Securities and Exchange Commission, had published defamatory statements concerning the plaintiff in press releases. A judgment of dismissal for failure to state a cause of action was entered by Justice Goldsborough on October 6, 1939. An appeal to this court is pending.

Moreover, there is nothing in the rule of absolute privilege from liability in defamation, or in the broader rule of general immunity from which it stems, or the reasons for them, which suggests any distinction based on the form of the communication in the one case or the kind of action in the other. In both cases, the only relevant question is whether the acts are done by an officer in relation to, or have more or less connection with the general matters committed by law to his control or supervision. And the reason for both rules is that "otherwise the perfect freedom which ought to exist in the discharge of public duty might be seriously restrained and often to the detriment of the public service." *De Arnaud v. Ainsworth*, 24 App. D. C. 167, 178 (1904); *Cooper v. O'Connor*, 99 F. (2d) 135, 139, 69 App. D. C. 100, 107 (1938). That reason transcends the mere form of the particular action of the official. It applies to all kinds of acts, and in the case of defamation just as much to a press release as to other forms of communication.

With respect to appellant's apparent assertion in his brief that there was no specific statutory authority for the issuance of this press release, the courts have held that no such specific authority is necessary in order to

invoke the rule of immunity. In *Cooper v. O'Connor*, 99 F. (2d) 135, 139, 69 App. D. C. 100, 104 (1938), this court prefaced its statement of the general rule by saying: "It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (*United States v. Bird-sall*, 233 U. S. 223, 230-231 * * *)." In *Spalding v. Vilas*, 161 U. S. 483 (1896), an argument substantially the same as appellant's was made and expressly overruled. And in all the other defamation cases, hereinabove cited, in which the absolute privilege has been sustained, there was no specific statutory authority for making the allegedly defamatory statements. Moreover, as we have shown, in the absence of any allegation in the complaint on the subject of lack of authority, the point may not be made.

The other subtitle of the portion of appellant's brief devoted to the question of absolute privilege is this: "(b) The defamatory statements in the appellee's press release are wholly unrelated and foreign to the subject-matter of the release and wholly unnecessary to accomplish any lawful purpose relative to the occasion for the release" (P. 23). The argument in substance consists of the assertion that the occasion for the issuance of the release was his letter to oil operators and that there "exists no relation between that occasion and any barring of appellant from practice before the Department" (P. 26). This assertion is based on two fallacies. The first fallacy is that there is no such relationship. The second is that under the circumstances of this case such relationship was essential.

There are at least two ties of relationship between appellant's solicitation of funds in order to "reform" the administration of the Connally Act, and the facts with respect to his being barred from practice. (1) In attempting to achieve such reforms, one forum would be the Department charged with the administration of the act. It cannot be said to be irrelevant to inform those interested in using appellant's services as attorney that that forum was closed to him for a fixed period of time. *Cf. Spalding v. Vilas*, 161 U. S. 483 (1896). (2) The facts set forth in the release in connection with appellant's being barred reveal a controversy between him and the appellee, administratively and in the courts, in which appellant had been unsuccessful. The appellant was about to engage in an effort to "reform" the administration of an act by the very official responsible for his being barred and with whom he had engaged in this unsuccessful controversy. That he had been barred and had been unsuccessful was relevant as revealing bias and a subjective interest in attacking the appellee's administration of the act. The oil operators to whom appellant had addressed his letter and the public at large were entitled to be informed of this bias and subjective interest. *Cf. Mellon v. Brewer*, 18 F. (2d) 168, 57 App. D. C. 126 (1927), *cert. den.*, 275 U. S. 530 (1928).

But the argument that such relationship did not exist presupposes that unless it did, the defense of absolute privilege would not lie. This is not at all necessarily so as a matter of law and is not so in this case. Even if we assume that there was no relationship between the

two general subject matters of the release, the fact still remains that each and every part of the release was related to either the administration of the Connally Act or the regulation of the recognition of attorneys before the Department, or both, and both are committed by law to the control and supervision of the appellee. It follows under the authorities we have cited that the absolute privilege applies. There is nothing in the cases which even suggests that in such circumstances the privilege would not be sustained.

At page 24 of his brief appellant quotes from *De Arnaud v. Ainsworth*, 24 App. D. C. 167 (1904), in which the absolute privilege was upheld, as follows:

Of course, when a party steps aside from duty and introduces into his report or communication facts immaterial, wholly irrelevant, and foreign to the subject of the inquiry a different question is presented. [Italics supplied.]

Immediately following in the report of the case are the words: "But no such question is presented here; * * *." But more significantly the appellant ignores the forepart of the quoted dictum which we have italicized and bases his argument on the latter part only. The court was obviously discussing the hypothetical case in which the introduction of defamatory matter wholly irrelevant and foreign would amount to stepping aside from duty. That is nothing like this case in which every part of the statement is related to one of two or both kinds of general duties of the appellee, and necessarily it cannot be said that he stepped aside from duty when he published any part of it. For the same reason,

the appellant is not helped by anything that was said or conceivably decided in *Miles v. McGrath*, 4 Fed. Supp. 603 (D. Md. 1933), and *Mellon v. Brewer*, 18 F. (2d) 168, 57 App. D. C. 126 (1927), *cert. den.*, 275 U. S. 530 (1928), both cited by appellant on this phase of his argument (appellant's brief, pp. 24, 25), and in both of which the absolute privilege was upheld.

POINT II

The press release was not defamatory and hence the amended complaint fails to state a cause of action

Apart from the absolute immunity accorded the appellee because the release was issued in the course of the performance of his duties as Secretary of the Interior, the amended complaint fails to state a cause of action because the press release was not defamatory.

A motion to dismiss does not admit the truth of the innuendo drawn by the pleader, but only the truth of the facts pleaded. "The function of the innuendo is explanation, it cannot change or enlarge the sense or meaning of the words." 3 Restatement of the Law of Torts (1938) 150; *Washington Post v. Chaloner*, 250 U. S. 290 (1919); *Maas v. National Casualty Co.*, 97 F. (2d) 247 (C. C. A. 4th, 1938); *Phillips v. Union Indemnity Co.*, 28 F. (2d) 701 (C. C. A. 4th, 1928). "Where a demurrer is interposed by the defendant to the petition of the plaintiff, the demurrer only admits the truth of the facts pleaded, but does not admit the truth of the inference of the pleader based on the facts pleaded, unless the facts themselves are sufficient to authorize such inference." * * * *Franklin v.*

World Publishing Co., 183 Okla. 507, 83 P. (2d) 401, 404 (1939); *Washington Post Co. v. Chaloner*, *supra*; *Maas v. National Casualty Co.*, *supra*. It follows that the press release, which is set forth in full in the complaint (R. 3-5), is alone controlling.

In determining whether a statement is or is not defamatory, the whole statement, not isolated words or sentences, must be read, for it is the connection in which the word is used which determines whether it is innocent or defamatory. *Washington Post Co. v. Chaloner*, 250 U. S. 290 (1919); *Washington Times Co. v. Hines*, 5 F. (2d) 541, 55 App. D. C. 326 (1925); *Lane v. The Washington Daily News*, 85 F. (2d) 822, 66 App. D. C. 245 (1936); *Meyerson v. Hurlbut*, 98 F. (2d) 232, 68 App. D. C. 360 (1939). "Words which standing alone may be reasonably considered defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable." 3 Restatement of the Law of Torts (1938) 148.

When the press release is examined in its entirety, its nondefamatory character is obvious. But the appellant attempts to find defamation in it by isolating portions from their context and then reading into them a meaning which they cannot conceivably have either in the light of their context or in isolation.

Thus, he first contends that the release was defamatory in saying that "Mr. Glass has been barred from practice before the Department". (Appellant's brief pp. 11-14.) Yet he concedes that he was in fact barred from practice before the Department at the time the release was issued. *Cf. Glass v. Ickes*, 107 F. (2d) 259

(App. D. C., 1939). And he further concedes that the use of the word "barred" as applied to his case was literally true. But he contends that the statement "just naturally conveys an untruth even though perhaps in a strict literal sense it is true," and that such a statement is necessarily a reflection upon the character of the person concerning whom it is said. (Appellant's brief, pp. 13, 14.) Appellant's position is entirely untenable.

If the sentence in isolation can conceivably be considered defamatory it is only because the verb "to bar" has a meaning not heretofore ascribed to it. It is neither correctly nor generally used or understood in the sense suggested by appellant. Webster's New International Dictionary (1939 ed.) defines the verb "to bar" in the only uses here applicable to mean: "To exclude or shut out. To hinder, prevent, or prohibit." We have been unable to find, and appellant has not directed attention to any dictionary, case, text, or other authority, in which the word has been said to convey a defamatory meaning. Instead, appellant attempts to impart gratuitously to the accepted and usual meaning of the word "bar" the derogatory implications of the entirely different word "disbar." We do not see, therefore, how the sentence considered alone can possibly be said to have a defamatory meaning.

But whatever conceivable doubt there may be with respect to the meaning of the sentence is completely dispelled by a reading of the press release as a whole. Thus read it is obviously not defamatory. The release recites that less than two years from the date on which

Mr. Glass terminated his connections with the Department he attempted to appear before the Federal Tender Board as an attorney; that there was at that time a subsisting departmental rule that no former employee might practice before any agency or board of the Department until two years from the date of the termination of his connection with the Department; that this rule was applied in the case of Mr. Glass; and he "was thereafter prevented from practicing before the Board" (R. 4).

Could it have been made more clear that Mr. Glass was barred from practice before the Department upon technical grounds which had no rational connection whatsoever with his character? Appellant apparently concedes the point. He says at page 14 of his brief:

To convey the truth when undertaking to tell the status of one of the many employees and ex-employees of the Department one must say much more than the above bare and unqualified literally true statement. He must say something on this order: "There is (or was) Departmental regulation which prohibits all of its employees from appearing as agents or attorneys before it for a period of two years after they leave the Department, and inasmuch as Mr. Glass has been out of the service less than two years, he cannot yet practice before it."

But the press release in substance does just that. Appellant's narrow position is, it seems, that the alleged defamatory words must be immediately qualified and explained in the very same sentence in which they appear. This is not only mere quibble but contrary to

the established rule that the entire statement is to be considered and that if the defamatory words are anywhere therein satisfactorily clarified and rendered innocuous, no libel action can be maintained. *Washington Post Co. v. Chaloner*, 250 U. S. 290 (1919); *Washington Times Co. v. Hines*, 5 F. (2d) 541, 55 App. D. C. 326 (1925); *Lane v. The Washington Daily News*, 85 F. (2d) 822, 66 App. D. C. 245 (1936); *Meyerson v. Hurlbut*, 98 F. (2d) 232, 68 App. D. C. 360 (1939).

Appellant makes one further attempt to show that the press release is defamatory. One of the paragraphs of the release is this:

The record shows that prior to September 15, 1937, Mr. Glass was chief investigator of the Federal Petroleum Agency No. 1 in the Department of the Interior, the investigative agency of Federal Tender Board No. 1. Effective September 15, 1937, he resigned his position in order to practice law at Tyler, Texas. A Departmental regulation promulgated by Secretary Ickes in March of 1933 provides that no ex-employee of the Department may practice before the Department or any of its agencies or boards for two years after his services with the Department are terminated. This regulation is to prevent Government employees selling confidential knowledge and experience. Contrary to such regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board. Prior to his resignation Mr. Glass had supervised a matter in which Mr. Brewer was concerned and had initialed and signed memoranda to his superior, the Director of the Federal Petroleum Agency, in which he

had recommended that certain action be taken. After Mr. Glass resigned Mr. Brewer was subpoenaed by the Federal Tender Board to appear before the Board and testify in this very matter. [R. 4.]

The following is the appellant's version of this paragraph (appellant's brief, p. 15):

He [the Secretary of the Interior] recites that the Secretary of the Interior made a certain regulation regarding practice before the Department, and then he says:

"This regulation is to prevent Government employees selling confidential knowledge and experience. Contrary to that regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board" (R. 4).

Then he says that Glass prior to his resignation had supervised and recommended action in this "very matter" concerning Mr. Brewer.

There could be no doubt about what these statements mean to the ordinary reader. Clearly one could not act "contrary to" a regulation which "prevents Government employees from selling confidential knowledge," without selling or attempting to sell confidential knowledge. No lawyer could do anything worse than that.

This quotation from his brief is characteristic of appellant's efforts to prove that the release was defamatory. He first quotes, out of their context, two sentences from the statement. As is usually the case with fragmentary quotation, the result achieved is misleading—the fragment is made to suggest a meaning which, in its original context, it could not possibly con-

vey. Then he significantly avoids quoting the next two sentences and gives us his "version" of them instead. The appellant's "version" does not even remotely resemble their actual content. What was clearly said was that Brewer was subpoenaed in the same matter which Glass had supervised and in which he had recommended certain action. It cannot reasonably be contended that what was said was that Glass had attempted to represent Brewer in the same matter which he had supervised before he resigned. But in his complaint appellant suggests that this was said (R. 5, par. V), and in his brief he attempts to support his assertion by the spurious and distorted paragraph which we have quoted.

In the last paragraph of the above quotation from his brief, appellant persists in finding a meaning which obviously was not in the words of the press release. In the release, the regulation is described and the reason for it explained. It is then said that Glass attempted to represent Brewer "contrary to the regulation," not contrary to the reason for it. And of course the description of the regulation specifically refers to "no ex-employees" being permitted to practice for two years, not those who sell confidential knowledge or experience. But disregarding the plain language of the release, appellant suggests that to say that Glass attempted to represent Brewer contrary to the regulation is to say that he sold or attempted to sell confidential knowledge.

We submit, therefore, that the press release cannot reasonably be considered defamatory and the com-

plaint for that reason as well fails to state a cause of action.

CONCLUSION

The judgment of the District Court dismissing the action was right and should be affirmed.

Respectfully submitted,

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Dated JANUARY 30, 1940.

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No. 7460

Joseph W. Stewart

CLERK

In the

United States Circuit Court of Appeals

For the District of Columbia

JOHN D. GLASS, *Appellant*,

vs.

HAROLD L. ICKES, Secretary of the Interior, *Appellee*.

REPLY BRIEF OF APPELLANT

CLAUDE L. DAWSON,
Attorney for Appellant,

JOHN D. GLASS,
Appellant.

April Term, 1939.

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No. 7460

In the
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JOHN D. GLASS, *Appellant*,

vs.

HAROLD L. ICKES, Secretary of the Interior, *Appellee*.

REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

(1) Appellant should not be thrown out of Court for failure to allege a conclusion of law.

(2) Inasmuch as the press memorandum is reasonably capable of the defamatory meaning assigned to it in the complaint, it was improper to dismiss the action on the grounds that the memorandum was not defamatory.

(3) The subject of the press release is not so related to appellee's official duties as to accord him absolute

privilege to publish it, even if the rule were as broad as is urged in his brief.

ARGUMENT

I.

Appellant should not be thrown out of Court for failure to allege a conclusion of law.

Appellee's Counsel urge that the appellant's amended complaint is bad because of the absence of any allegations that the publication of the appellee's press release was beyond his authority. They rely principally upon ~~the~~ the concluding statement of this Court in *Copper v. O'Conner*, 99 F. (2nd) 135-137, App. D. C., August, 1939, (Appellee's Brief, page 19-20).

The only way such proposition could possibly support appellee's contention in this case would be to construe it as meaning that it was necessary that the Appellant allege in general terms that the publication of the press release was beyond the authority and scope of duty of the Secretary of the Interior.

Such an allegation would have been bad pleading and would have added nothing to the complaint. It would violate the rule many times asserted by Federal Courts; that the pleading of general statements as to validity, regularity, or constitutionality of particular laws, acts, claims, conduct or instruments, and general statements as to the appointments or duties of

public officials, are merely conclusions of law; that the pleader must specifically set forth the facts upon which the Court itself can construe the law; that the office of pleading is to state facts, not conclusions of law; that such general allegations add nothing to the pleading against a general demurrer and nothing can be gained by them. The following cases are particularly in point:

Silberheim v. United States, 226 U. S. 221; 45 Sup. Ct. 69; 69 L. Ed. 256;

Golta v. Davis, 29, F. (2nd) 257 (Cert. Den); 49 Sup. 264;

Navigasione v. United States, 36, F. (2nd) 631;

Harwood v. McMurtry, 22 F. Sup. 572.

It is obvious that the Court in *Cooper v. O'Conner*, supra, was merely reiterating the well settled rule, that in such cases the complainant must allege facts which show that the complained-of action was beyond the scope of his official duty. The appellant's amended complaint properly does that without alleging any conclusion of the pleader.

Appellant pleaded all the essential facts concerning the alleged defamatory press release. He alleged it was a false and defamatory written memorandum of the appellee wilfully and maliciously published, released, circulated and delivered to the press associations and to divers newspapers and individuals throughout the

land, and published to the world. He pleaded in detail how it was defamatory and false, and that the appellee knew it to be false and published and circulated it deliberately for the purpose of injuring, damaging, discrediting and destroying his reputation and professional standing; and he quoted the release in full.

The appellee's Counsel vigorously insists that the Court will take judicial notice of the appellee's official capacity, the extent of his authority, the scope of his duties and of certain Acts of Congress and of a certain Departmental Regulation issued by him. Appellant submits that the Court, in taking judicial notice of all Federal statutes and all regulations, will also judicially notice that there exists no statute, valid executive order or regulation, or rule of reason, making it the official duty of the Secretary of the Interior to publish to the Word press releases, such as that pleaded in appellant's amended complaint, falsely defaming the character of a citizen merely because the citizen seeks amendments by Congress of a Federal Law. And it will be judicially noticed that, under our system, the office of Secretary of the Interior is strictly administrative, and the powers and duties concerning enactment and amendment of Federal legislation repose in Congress. And, granting the Secretary some right, duty or authority to inform or advise Congress, officially and in proper time and manner, concerning legislation in which his Department is interested, it will be noted the press memorandum was not merely an of-

ficial communication to Congress. In taking such judicial notice, the Court should find that the release of the defamatory memorandum to the press by the appellee was purely gratuitous, and not within the scope of his official duties.

The Court can reach these conclusions in spite of the fact the defamatory memorandum was upon the stationary of the United States Department of the Interior or under its letterhead. The Court can find that the memorandum is not, in fact, what it may purport to be or what Mr. Ickes may have attempted to make it appear to be. The attempt to dignify the memorandum with the name of the Department merely aggravated the injury; it did not make the memorandum an official-duty communication.

From the facts pleaded the Court itself can reach the proper conclusions of law without the aid of any averment thereof by the appellant.

II.

Inasmuch as the press memorandum is reasonably capable of the defamatory meaning assigned to it in the complaint, it was improper to dismiss the action on the grounds that the memorandum was not defamatory.

In his brief the appellee insists that the article which he released to the press was not defamatory of the appellant. The appellant, on the other hand, stoutly main-

tains that it was most defamatory; and that by it Mr. Ickes simply warned the world to stop, look and listen to him and to pay no attention to the appellant because he was a crooked lawyer who was barred from practice before a Government Department for unethical conduct.

But it is not necessary for the Court to definitely decide the issue of whether the press release was in fact defamatory, for it is error to sustain a motion to dismiss on the grounds that the allegedly defamatory statements were not defamatory, unless the Court can find that it is not reasonably capable of the defamatory meaning assigned to it in the complaint. Appellee's counsel apparently concede that such is the rule. This Court has held that where an article is capable of two meanings the question of whether it is defamatory is for the jury to determine upon proper instructions. *Meyerson vs. Hurlbut*, 98 Fed. (2) 232 (App. D. C.)

Appellant submits that there can be no doubt that the press memorandum is reasonably capable of the defamatory meaning which he assigned to it in his amended complaint. Surely it was capable of a meaning which should prejudice or injure the appellant in his profession; and the law is well settled in this jurisdiction that defamatory words, falsely spoken, which prejudice a person in his business, trade or profession are actionable per se.

Washington Post Company vs. O'Connell, 43 App. D. C. 215;

Marino vs. Di Marco, 41 App. D. C. 76;

Pollard vs. Lyons, 91 U. S. 225, 23 L. Ed. 308;

Bailey vs. Holland, 7 App. D. C. 184.

Words charging an attorney of being barred from practice and of selling confidential knowledge, with an admonition to stop, look and listen before dealing with him, are libelous per se. Such was the charge in the press release. The article charged that appellant "has been barred from practice before the Department," and then suggested that oil operators "stop, look and listen before they finance this proposed one-man lobby." The article further states that the Secretary of the Interior had promulgated a Regulation providing that an ex-employee of the Department may not practice before it for two years after his services with the Department are terminated, and recites: "This Regulation is to prevent public employees from selling confidential knowledge and experience." Then the article charges: "Contrary to such Regulation Mr. Glass attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board."

From the above quoted excerpts any reasonable man could conclude that the appellant had been barred from practice because of unethical conduct, such as selling or attempting to sell confidential knowledge previously acquired while in the Government service, and that therefore he was not a proper person with whom to deal. The appellee attempts to show that the article was not libel-

ous when considered in its entirety; but there is nothing else in the article which would definitely obliterate the obvious meaning of the language of the above quoted parts from the mind of the ordinary reader.

III.

The subject of the press release is not so related to appellee's official duties as to accord him absolute privilege, even if the rule were as broad as is urged in his brief.

In their efforts to show that the libelous statements were related to the official duties of appellee, his counsel argue that the fact that the appellant was not permitted to practice before the Department was relevant to his petitioning of Congress for amendments to the Connally Act and his soliciting of aid therein, for the reason that the public was entitled to know that the appellant was biased against Mr. Ickes because Mr. Ickes had barred him from practice. (Appellee's Brief, p. 24). They would have this Court believe that it was the official duty of the appellee to tell the public that the appellant was motivated in his legislation reform efforts by antipathy toward appellee; and that that is why appellee issued the press memorandum and is all he said therein; and that such was a matter so related to his official duties as to authorize him to publicly defame appellant's character with absolute immunity.

The tone and language of the memorandum eliminates any possibility of it having been issued for the purpose suggested by the appellee's counsel. And the fact that a man is temporarily prohibited from practice, because of his former employment, bears no relation to his petition to Congress for an amendment to an oil law. There is nothing in the press memorandum to indicate to the ordinary reader, or to the Court, that Mr. Ickes was merely revealing to the public that Glass was biased against him. And if such a bias did exist it would bear no such relation to any official duty of the Secretary as to authorize him to falsely defame appellant's character, even if the rule of absolute privilege were as unlimited as urged by appellee's counsel.

When appellee's counsel first thought of the matter of any prejudice or animosity they did approach the truth of this case. When Mr. Ickes heard that appellant was seeking changes in one of his pet laws, he became so worked up over it that he decided to try to stop appellant by a false libel of his character, regardless of the consequences. His press memorandum is to that effect self-explanatory.

The press release contained nothing with reference to the duties of the Secretary of the Interior under the Connally Act. It stated nothing concerning the merits of any proposed amendments to that Act or changes of the policies of its enforcement. When appellee Ickes issued it he had nothing before him for official decision. The subject of the release was a matter which was not be-

fore the Department of the Interior for any decision. Proposed amendments to the Connally Act, referred to in the article, were a matter for the determination of Congress. The press release was purely a gratuitous action by the appellee. It bears no real relation to any matter upon which the Secretary may have had a duty to speak. Its issuance and the arguments in appellee's brief indicate that appellee is firmly imbued with the idea that he is immune from liability for any malicious and false defamation of a citizen's character, so long as he adds "Secretary of the Interior" after his signature.

The case of *Spaulding v. Vilas*, 161, U. S. 483, strongly relied upon by the appellee, clearly does not support his argument. In that case the Postmaster General had been authorized by Congress to pay certain claims, and the notice which he sent claimants was clearly within the scope of the authority and duty expressly imposed upon him by Congress.

All of the cases cited by the appellee indicate, if they do not so hold, that when a public official steps outside the scope of his official duties he is in no better position than the ordinary person and may be held responsible for his acts.

An officer of the United States may be sued where he has exceeded the authority validly conferred upon him, and the exemption of the United States from liability for torts does not protect its officers from personal liability to persons whose rights have been wrongfully in-

vaded by them. *Noce, U. S. Engineer v. Morgan Company*, 106 Fed. (2) ~~262, 264~~ ⁷⁴⁶ (4th C. C. A.).

It has been difficult to find cases directly in point. This may be accounted for by the fact that during the 150 years of the existence of our Government, before Mr. Ickes became Secretary of the Interior, none of our Cabinet Officials had been notoriously inclined to vitriolic attacks upon the characters of citizens exercising their constitutional rights to criticize the policies of a National Administration; and none had habitually pursued such inclination through the press and radio for the purpose of destroying the reputation of those who disagreed with him on public questions.

This Court held in the case of *Harlow v. Carroll*, 6 App. D. C. 128, that false and scandalous matter contained in an answer to a bill in equity and concerning the complainant is not privileged if irrelevant, and if libelous will subject the defendant to an action for libel, and its relevancy or irrelevancy is a question of law for the Court. That wanton libel and slander wholly uncalled for are no more entitled to the privilege of immunity from suit than are assault and battery or any violation of right. This Court, in discussing that case, stated that grave charges of misconduct occasionally occur in judicial proceedings, but it is not often that courts are invoked to remedy for utterances so grossly libelous and so wantonly unnecessary as the statements for which

that suit was brought. Such language of this Court in that case is quite appropriate here.

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